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BERJAYA GENERAL INSURANCE BHD

v.

GOH MAY LING

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 12-49-2005]
28 MARCH 2007

C ***CIVIL PROCEDURE:*** *Summary judgment - Subordinate Courts Act 1948, O. 26A - Triable issues - Whether raised - Whether merited a full trial - Whether plaintiff's claim should proceed to trial*

D This was an appeal by the appellant-first defendant ('the first defendant') against the decision of the sessions court judge allowing the respondent-plaintiff ('the plaintiff') to enter summary judgment against the first defendant under O. 26A of the Subordinate Courts Act 1948, whereby the first defendant was ordered to pay the plaintiff a sum of RM40,000 as the total value E of the motorcar bearing registration MAP 8856; RM18,000 for loss of use of the car for ninety days; interest on RM58,000 and costs of RM1,387. The first defendant had paid to the plaintiff a sum of RM63,099 being the total judgment sum. The facts were that the car was involved in an accident and the first defendant's F adjuster assessed the damages sustained by the car. The plaintiff had executed an agreement with the second defendant, pursuant to which the second defendant repaired the car and delivered it to the plaintiff. The plaintiff then executed a satisfaction note, certifying that all repairs to the car rendered necessary through the G accident have been carried out to her satisfaction and that the payment made by the first defendant direct to the second defendant covering the cost of such repairs constituted a full release of the claim ('the insurance policy'), of which the first defendant was the insurer and the plaintiff the insured. The car H was later examined by Puspakom which stated that it had not complied with the Road Transport Act 1987 and the rules made thereunder. Subsequently, the plaintiff filed a claim against the first defendant and averred that the latter was under an obligation to repair the car to the standard required by the Road Transport I Department, or alternatively, to pay to the plaintiff the market value of the car by way of total loss. The first defendant submitted that it had been released from any liability under the execution of

the satisfaction note. The question for determination in this appeal was whether the first defendant had raised any triable issue so as to bar the plaintiff from signing summary judgment under O. 26A.

Held (allowing first defendant's appeal and setting aside summary judgment entered):

(1) The first defendant had exercised the option under cl. 2(a)(i) of the insurance policy *ie*, to pay the cost of repairs to the car and the plaintiff had signified her acceptance of the cost of repairs by executing the satisfaction note. The question whether the plaintiff was entitled to a second bite at the proverbial cherry was an issue which merited a full trial. The issues raised for the first defendant were clearly triable issues which were eminently unsuitable for the signing of a summary judgment in favour of the plaintiff. Hence the plaintiff's claim should proceed to trial. (paras 12, 13 & 14)

Case(s) referred to:

Malaysian Assurance Alliance Bhd v. Yeam Sai Ming & Ors [1996] 1 LNS 94 HC ***(refd)***

United Malayan Banking Corp Bhd v. Lim Meng Hua & Ors [1990] 1 MLJ 54 ***(refd)***

Legislation referred to:

Subordinate Courts Act 1948, O. 26A

For the plaintiff - WS Goh; M/s WS Goh & Assoc

For the 1st defendant - B Balakumar Balasundram; M/s Azim, Tunku Farik & Wong

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

[1] This is an appeal by the appellant-first defendant ("the first defendant") against the decision of the learned sessions court judge who had on 7 July 2005 allowed the respondent-plaintiff ("the plaintiff") to enter summary judgment against the first defendant under O. 26A of the Subordinate Courts Act 1948, whereby the first defendant was ordered to pay the plaintiff a sum

of RM40,000 as the total value of the motorcar bearing registration No. MAP 8856; RM18,000 for loss of use of the car for 90 days; interest on RM58,000; and costs of RM1,387.

[2] The first defendant had on 1 September 2005 paid to the plaintiff a sum of RM63,099 being the total judgment sum.

Factual Background

[3] The car was involved in an accident on 7 December 2002.

[4] On 10 December 2002, the first defendant's adjuster assessed the damage sustained by the car.

[5] The plaintiff had on 20 January 2003 executed an agreement with the second defendant, pursuant to which the second defendant repaired the car and delivered it to the plaintiff sometime in May 2003. The plaintiff then executed a satisfaction note, certifying that all repairs to the car rendered necessary through the accident on or about 7 December 2002 have been carried out to her satisfaction and that the payment made by the first defendant direct to the second defendant covering the cost of such repairs shall constitute a full release of the claim made under Policy No. 02DMC/MPE 123033 ("the insurance policy"), of which the first defendant was the insurer and the plaintiff the insured.

[6] On 22 June 2004, the car was examined by Puspakom which stated that the car had not complied with the Road Transport Act 1987 and the rules made thereunder, as the car was suspected to show signs of dissection and reconnection to the floor and the roof thereof.

[7] On 10 November 2004, the plaintiff filed a claim against the first defendant and averred that the first defendant was under an obligation to repair the car to the standard required by the Road Transport Department, or alternatively, to pay to the plaintiff the market value of the car by way of total loss.

Satisfaction Note

[8] First defendant's learned counsel Mr. B Balakumar Balasundram submitted that:

(1) the plaintiff had executed the satisfaction note and so the first defendant had been released from any further liability under the insurance policy; and

(2) there was a lapse of 13 months from the date of plaintiff's execution of the satisfaction note in May 2003 to the examination of the car by Puspakom on 22 June 2004 and a new registration number had been given to the car. Hence, the first defendant was to be released from any liability after the execution of the satisfaction note.

[9] Mr. WS Goh, plaintiff's learned counsel, contended that the first defendant's payment to the plaintiff of the cost of repairs to the car has not released the first defendant from the liability under the insurance policy which provides for full indemnity in cl. 2 thereof.

[10] In my view, the question for determination in this appeal is whether the first defendant had on the substantially undisputed facts as alluded to by way of the parties' affidavits filed herein, raised any triable issue so as to bar the plaintiff from signing summary judgment under O. 26A (see eg, *United Malayan Banking Corp Bhd v. Lim Meng Hua & Ors* [1990] 1 MLJ 54 HC; *Malaysian Assurance Alliance Bhd v. Yeam Sai Ming & Ors* [1996] 1 LNS 94 HC).

[11] In this regard, it is necessary for me to refer cl. 2 of the insurance policy which reads:

Basis of Settlement

(a) We will at our option

(i) pay the cost of repairs to your vehicle, or

(ii) pay in cash the amount of the loss or damage to your vehicle; or

(iii) reinstate or replace your vehicle.

[12] It is apparent that the first defendant had exercised the option under cl. 2(a)(i) above ie, to pay the cost of repairs to the car and the plaintiff has signified her acceptance of the cost of repairs by executing the satisfaction note.

[13] That being the case, the question whether the plaintiff is entitled to a second bite at the proverbial cherry is an issue which merits a full trial. The issues raised for the first defendant are clearly triable issues which are eminently unsuitable for the signing of a summary judgment in favour of the plaintiff.

[14] Hence, the plaintiff's claim should proceed to trial. I therefore allow the first defendant's appeal with costs here and the court below. I also set aside the summary judgment entered by learned sessions court judge and order that an early date be given for the full hearing of the plaintiff's claim.

[15] I further order that the plaintiff refund the sum of RM63,099 paid on 1 September 2005 by the first defendant to the plaintiff, with interest from the date of this judgment to the date of realisation.